

121

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Supreme Court, U.S.
FILED
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No. 08-865

IN THE
Supreme Court of the United States

CONSOLIDATION COAL CO.,

Petitioner,

v.

LEVISA COAL CO.,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

SUPPLEMENTAL BRIEF OF PETITIONER

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February 19, 2009

Petitioner Consolidation Coal Co. files this supplemental brief to alert the Court to recent developments in this case upon remand to the Circuit Court for Buchanan County, Virginia. Recent action by the Circuit Court entering a permanent injunction against Consolidation without providing Consolidation any opportunity to present evidence confirms that this Court should grant Consolidation's petition for a writ of certiorari to the Supreme Court of Virginia.

In its petition, Consolidation explained that review by this Court is necessary because the Supreme Court of Virginia violated long-standing precedent under the Due Process Clause by determining Consolidation's rights without permitting Consolidation any opportunity to present evidence in its defense. *See Saunders v. Shaw*, 244 U.S. 317, 319-20 (1917); *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876); *see also Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930). This case reached the Supreme Court of Virginia on a truncated, one-sided record because the trial court had denied respondent Levisa Coal Co.'s motion for a preliminary injunction at the close of Levisa's evidentiary case. Consolidation thus had no need, and no opportunity, to present evidence in the trial court. On review, however, the Supreme Court of Virginia definitively determined Consolidation's rights even though Consolidation had no opportunity to present evidence relevant to the interpretation of a governing lease. In particular, Consolidation did not even have the chance to put in the record two critical documents that defined the rights addressed in the lease. *See Pet.* at 7-11.

If there could have been any doubt that the Supreme Court of Virginia's decision definitively determined Consolidation's rights, the actions of the Circuit Court for Buchanan County last week eliminated that doubt. On remand from the Supreme Court of Virginia, the Circuit Court held a hearing on February 10, 2009. At that hearing, the Circuit Court treated the Supreme Court of Virginia's interpretation of the lease as dispositive and, although Consolidation again complained that it had never had any opportunity to present any evidence, proceeded to enter a permanent injunction without providing Consolidation the chance to put on evidence in its defense. See Supp.A1. The Circuit Court's order confirms that the Supreme Court of Virginia's decision violates this Court's precedent under the Due Process Clause. This Court has long made it clear under circumstances identical to those presented here that a state court may not definitively determine a party's rights without providing the party an opportunity to present evidence. See, e.g., *Saunders v. Shaw*, 244 U.S. 317, 319–20 (1917).

The Circuit Court's action also confirms that, absent relief from this Court, Consolidation will *never* have the opportunity to present evidence in its own defense. The Due Process Clause requires more. Granting the writ is necessary to ensure that, consistent with this Court's due process jurisprudence, Consolidation is afforded the most basic of rights — an opportunity to present evidence in its defense.

For these reasons, and for the reasons stated in Consolidation's petition, the Court should grant the

petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT FOR
THE COUNTY OF BUCHANAN

LEVISA COAL COMPANY, a)	
Virginia Limited Partnership)	
and L.L.P.,)	
)	
Plaintiff,)	
)	
v.)	Case No.
)	CL06000408-01
)	
CONSOLIDATION COAL)	
COMPANY,)	
)	
Defendant.)	

ORDER

On February 10, 2009 the parties appeared for hearing on Plaintiff's Motion for Partial Summary Judgment and Motion to Restrict Equitable Defenses. Upon consideration of the pleadings, the argument of counsel, and the record as a whole, and for the reasons advanced by the plaintiff, plaintiff's Motion for Partial Summary Judgment as to its request for permanent injunction is hereby GRANTED. Consolidation is hereby permanently enjoined from the further dumping of water into the VP3 Mine. All further dumping shall immediately cease on February 19, 2009 at 2:00 p.m.

Supp.A2

All other issues are hereby reserved for trial or for decision by further order of the Court.

The Clerk is requested to certify copies of this Order to all counsel of record.

ENTERED this 10th day of February, 2009.

/s/

Hon. Ford C. Quillen